Supreme Court, U. S.
F I L E D
AUG 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.: 74-1324

RONALD GENDRON,

APPELLANT,

-VS-

HONORABLE EDWARD H. LEVI, ETC.; ET AL.,

APPELLEES.

On Appeal From A United States District Court Of Three Judges For The Central District Of California

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Pursuant to Rule 16(4) of the Rules of this Court, appellant respectfully prays that this Court deny appellees' motion to affirm the judgment of the district court. This Court should accord this case plenary consideration, with briefs on the merits and oral argument.

ARGUMENT

Appellees, in the Motion to Affirm, grudgingly admit that appellant's constitutional attack of 38 U.S.C. §3404(c) has never been considered by this Court (M.A., 3n.4), and that the statute precludes veterans from obtaining "the services of an attorney [who] would be of significant assistance" (M.A., 7n.9).

Despite these concessions, appellees urge that this Court summarily affirm the judgment of the three-judge district court on the following grounds: (1) "the constitutional validity of the current legislation, or predecessor statutes . . . has been sustained by every court that has considered the question" (M.A., 3); (2) "Congress has made provision for supplying, without charge, expert lay assistance to the veteran in preparing and presenting his claim . . . [from] certain veterans and patriotic organizations" (M.A., 4); and (3) the Government has a competing governmental

interest to appellant's which under the "balancing of interests" test outweighs appellant's need to be represented by counsel before the VA (M.A., 7).

Appellant believes that none of these arguments has merit and that this case--and the statute under attack--deserve the close examination of this Court.

A. There Is No Persuasive Precedent in Appellees' Favor

For "precedent" appellees rely primarily on a collection of Court of Appeals decisions which they claim decide the procedural due process issue in their favor. If the Court of Appeals decisions cited by appellees had seriously grappled with the problems this lawsuit raises, relative to defining property rights and balancing governmental and individual interests, this Court might be justified in declining plenary consideration of those problems. Such is not the case, however.

The two most recent decision, Bodey v. United States, 495 F.2d 1370 (4th Cir. 1974) and Holley v. United States, 477 F.2d 600 (6th Cir. 1973), aff'g 352 F.Supp. 175 (S.D.Ohio 1972), were decided without any opinion at all. The only other Court of Appeals ruling on this issue, Hoffmaster v. VA, 444 F.2d 192 (3d Cir. 1971), merely asserts the constitutionality of the $10 fee limitation without any analysis or justification. (Furthermore, the appellant in Hoffmaster appeared in the Court of Appeals in propria persona, and failed to file a brief. [Reporter's Transcript of Oct. 29, 1973, at 22.]).

There are currently other actions now pending in the Court of Appeals for the District of Columbia (Staub v. Johnson, No. 74-1504, argued March 11, 1975) and in the Northern District of Illinois (Doria v. Saxbe, No. 74 C 3629, motion to convene three-judge court granted on June 5, 1975, per McMillen, J.). Until this Court plenarily decides the relevant issues, important unsettled questions --such as when entitlement to a government benefit constitutes a "property right", and how far the government may go in barring lawyers from participating in benefit distribution schemes--will continue to occupy the already overburdened federal courts. This is true even though this Court could affirm the decision below, which would be "precedent", since, as this Court recently observed, summary affirmances "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974). The issues tendered here broadly affect many millions of veterans, and this Court is now the proper forum for the resolution of these questions of great public importance.

B. The Record Suggests That Lay-Representation Is Neither As "Expert" Nor "Skilled" As Appellees Baldly Assert

Appellees below characterize the quality of the available lay-representation as "expert" and "skilled" (M.A., 4 & 7). For this reason, appellees suggest, the fact that the statute in question deprives veterans of an attorney is not of great moment, since equally capable representation would be available. There is no basis, however, for appellees' characterization, and this Court should not be influenced by it here.

As presented as a Question on Appeal (No. 5), and as noted in appellant's Jurisdictional Statement (J.S. 9-10, D-1 - D-6), appellant contended and offered proof that the lay-representation supplied by veterans and patriotic organizations was often not competent, skilled or provided to veterans when requested. Appellant believes that the three-judge court erroneously refused the offer of proof, or competent evidence on this point. For the appellees now to assert "expertise" and "skill", without any reference to the record below, is highly unfair. Indeed, the record bristles with citation to congressional hearings testimony and a private study which minimize the value of lay-representation to deserving veteran claimants such as appellant herein. See, e.g., P. Starr, The Discarded Army: The Nader Report on Viet-Nam Veterans and the Veterans Administration (1973); Testimony of Prof. Frederick Davis, Hearing, Before the Subcommittee on Representation of Citizen Interests, of the Senate Committee on the Judiciary, 93d Cong., 1st Sess. 520 (1973).

At the least, should this Court determine that the fact that lay-representation is available forms a basis for upholding the constitutionality of the statute, then this Court should also hold that the quality of such representation is also fairly at issue. In such event, this Court should remand this appeal to the district court to accept evidence on this issue.

C. Governmental Interests Do Not Outweigh Individual Interests In This Case Or Similar Cases

Appellees assert that the federal government's interests in limiting to $10 the lawyer's fees in veterans disability proceedings are "to protect the public fisc and to assure that governmental benefits are received, without substantial depletion" by the intended beneficiaries (M.A., 4). Furthermore, they argue that in view of the availability of free lay-representation (discussed above) and the allegedly simple and "nonadversary" nature of many VA claims, veterans' interests in

receiving legal representation in administrative proceedings cannot overcome these government interests.

While these arguments have some superficial plausibility, they do not withstand scrutiny. A $10 fee limitation is such an irrational over-reaction to any need to protect the public treasury against claims motivated by a lawyer's hope of gain, that its existence cannot be justified on that basis. Administrative review of fee awards, or a percentage limitation can accomplish the commendable end of assuring that only valid claims be presented, and that the veteran will receive the lion's share of the benefits intended for him. The interest in preserving the full amount of benefits for veterans entitled to them is laudable; but it is hardly consolation to veterans erroneously denied benefits by the VA because they were not represented by lawyers.

Appellees' emphasis on the simplicity of most veterans' disability proceedings (once again baldly asserted, and without support in the record), the helpfulness of VA personnel, and the availability of free lay assistance, do not establish the dominance of this interest over a veteran's desire --or need--to retain counsel. First, as appellees must and do concede, not all disability claims are routine. The volume of regulations on the subject, the existence of disputed appeals (which oft-times

raise subtle and difficult questions of law), and the presence of lawyers on the VA's own staff indicate quite the contrary. Certainly appellant's dispute here over the "service-connectedness" of his disability is not a simple matter. (Indeed, the VA disputes that his psychiatric order exists, whether or not it is disabling if it does exist, and is of the type of psychiatric disorders which would entitle a veteran to benefits under applicable VA regulations.) Yet, the $10 fee limitation makes no distinctions between such simpler cases and the more complex ones.

Second, although VA regulations may provide for a "non-adversary" hearing, this Court has pierced such rhetoric in other administrative and quasi-judicial contexts. Cf. In re Gault, 387 U.S. 1 (1967). As Professor Robert Rabin has pointed out "[a]gencies making determinations of entitlement do not have a history, by and large, of playing the role of advocate for their client groups: witness the welfare bureaucracy and the Selective Service System." Rabin, Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis, 27 Stan. L.Rev. 905, 917n. 49 (1975). There are institutional constraints on VA decision-makers (such as internal audits that produce information used in promotions and demotions) that can affect the extent to which they will actively assist the veteran or his lay-repre-

sentative. See Mashaw, The Management Side of Due Process, 59 Cornell L.Rev. 772 (1974). Furthermore, the total absence of judicial review (under 38 U.S.C. § 211 [a]) removes any countervailing pressure on administrators to act vigorously on the claimant's behalf. Thus, the need for lawyers is not eliminated or reduced substantially by the explicitly non-adversary nature of the proceeding.

Third, and most important, is the simple fact that the availability of free lay assistance in no way supports the government's interest in discouraging legal representation by limiting attorney's fees to $10. It does exactly the opposite. For if free lay assistance is available, the lawyer must compete with an attractive alternative, and the veteran may choose. If the lawyer cannot justify his expense in terms of additional benefits, the veteran need not retain him. Thus, the government's desire that veterans receive maximum benefits would not be undermined by giving veterans the opportunity to retain counsel at a fee higher than $10. By contrast, where free lay assistance is unavailable, and the veteran's two alternatives are self-representation and hiring a lawyer, it is more incumbent on the state to limit overreaching by the lawyer (although, even then, a $10 limitation is wholly irrational and unnecessary). Even ignoring the weaknesses of the lay-representation system related to the claimant's lack of choice and the possible role conflicts experienced by representatives working daily and closely with the VA, the existence of that system does not strengthen appellees' position. It weakens it.

Finally, no drastic disruption of the VA's claims process would ensue if this Court established a meaningful right to retain counsel in such administrative proceedings. Lawyers are already permitted to represent veterans before the VA (in the highly unlikely event a veteran can find one to represent him for the $10 maximum fee). It is only that the restrictions placed on the access to lawyer representation are so severe, and irrational, as to preclude attorney representation as a practical matter. There simply are no governmental interests on appellees' side of the scale.

CONCLUSION

Appellant respectfully urges this Court to deny appellees' motion to affirm and to order plenary consideration herein.

Respectfully submitted,

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July 1975.

CERTIFICATE OF SERVICE

I, Fred Okrand, certify as follows:

I am an attorney at law duly admitted to practice before the Supreme Court of the United States, and am one of the attorneys for appellant herein.

On July 31, 1975, I served the within BRIEF IN OPPOSITION TO MOTION TO AFFIRM on appellees herein by placing three copies thereof enclosed in a sealed envelope, with first class air mail postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Robert H. Bork, Solicitor General
Rex E. Lee, Assistant Attorney General
William Kanter and Robert S. Greenspan,
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Washington, D. C. 20530

I further certify that all parties required to be served have been served.

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